



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-125710-18]

RIN 1545-BP07

Revised Applicability Dates for Regulations under Section 382(h) Related to Built-in Gain and Loss

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Partial withdrawal of notice of proposed rulemaking; notice of proposed rulemaking.

SUMMARY: This document withdraws a portion of a notice of proposed rulemaking published in the Proposed Rules section of the **Federal Register** on September 10, 2019. That notice of proposed rulemaking contained proposed rules to provide guidance regarding the items of income and deduction that are included in the calculation of built-in gains and losses under section 382 of the Internal Revenue Code (Code). If adopted, those proposed rules would apply to any ownership change occurring after the date the Treasury decision adopting those proposed rules as a final regulation is published in the **Federal Register**. This notice of proposed rulemaking would delay the applicability of those proposed rules and provide transition relief for eligible taxpayers. The proposed regulations in this notice of proposed rulemaking would affect corporations that experience an ownership change for purposes of section 382.

DATES: Written or electronic comments must be received by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Written or electronic requests for a public hearing and outlines of topics to be discussed at the public hearing must be received by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-125710-18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send hard copy submissions to: Internal Revenue Service, CC:PA:LPD:PR (REG-125710-18), Room 5203, Post Office Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Jonathan R. Neuville at (202) 317-5363; concerning submissions of comments or requests for a public hearing, Regina L. Johnson at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On September 10, 2019, the Treasury Department and the IRS published in the **Federal Register** (84 FR 47455) a notice of proposed rulemaking (REG-125710-18) proposing revisions to the rules in §§1.382-2 and 1.382-7 (September 2019 proposed regulations). These rules would affect the determination of net built-in gains and losses

and recognized built-in gains and losses under section 382(h) that, in turn, affect the limitation under section 382 on net operating losses and disallowed business interest expense under section 163(j).

Proposed §§1.382-2(b)(4) and 1.382-7(g)(1), as set forth in the September 2019 proposed regulations, provided that the September 2019 proposed regulations would apply to ownership changes that occur after the date the Treasury decision adopting the September 2019 proposed regulations as final regulations is published in the **Federal Register**. As noted in part II of the Background in the September 2019 proposed regulations, section V of Notice 2003-65 (2003-2 C.B. 747) provides that taxpayers may rely on either of two safe harbor approaches for applying section 382(h) to an ownership change “prior to the effective date of temporary or final regulations under section 382(h).”

Taxpayers and practitioners have expressed concern that the applicability date set forth in the September 2019 proposed regulations would impose a significant burden on taxpayers evaluating and negotiating business transactions, due to their uncertainty regarding when those transactions will close and when the September 2019 proposed regulations will be finalized. As a result, taxpayers and practitioners have requested transition relief with regard to ownership changes caused by pending transactions. In connection with this request, taxpayers and practitioners also have expressed concern that transition relief limited to transactions for which a binding agreement is in effect on or before the applicability date of final regulations would be inadequate, because pending transactions regularly are modified or delayed prior to closing.

As explained more fully in the Explanation of Provisions, this notice of proposed rulemaking modifies the applicability dates for the September 2019 proposed regulations by withdrawing the text of proposed §§1.382-2(b)(4) and 1.382-7(g), as set forth in the September 2019 proposed regulations, and proposing revised applicability dates.

Explanation of Provisions

I. Delay of Applicability Date and Applicability of Pre-existing Guidance

To address the concerns raised by taxpayers and practitioners, the Treasury Department and the IRS are withdrawing the text of proposed §§1.382-2(b)(4) and 1.382-7(g) contained in the September 2019 proposed regulations. In its place, the Treasury Department and the IRS are proposing the revised applicability date text set forth in proposed §§1.382-2(b)(4) and 1.382-7(g) as contained in this notice of proposed rulemaking.

The Treasury Department and the IRS do not intend there to be any gap between the date on which taxpayers can no longer rely on Notice 2003-65 and the date on which the final regulations are applicable. Other than in the case of the two exceptions described in parts II and III of this Explanation of Provisions, the applicability date of the final regulations will be 30 days after the date the Treasury decision containing such regulations is published in the **Federal Register** (delayed applicability date). As provided in this proposed regulation, Notice 2003-65 will remain applicable to ownership changes to which the final regulations do not apply.

II. Limiting Duplicative Application of Section 382

The first exception to the delayed applicability date relates to the rule in proposed §1.382-7(d)(5), which provides that certain carryforwards of business interest expense disallowed under section 163(j) would not be treated as recognized built-in losses under section 382(h)(6)(B) if such amounts were allowable as deductions during the five-year recognition period set forth in section 382(h)(7)(A). This rule eliminates the possible duplicative application of section 382 to certain disallowed business interest expense carryforwards. Due to the noncontroversial nature of this rule, the Treasury Department and the IRS have determined that proposed §1.382-7(d)(5) should be finalized before the remainder of the rules in the September 2019 proposed regulations, and that taxpayers should be allowed to retroactively apply this rule. To that end, the Treasury Department and IRS expect that proposed §1.382-7(d)(5) will be finalized as part of the Treasury decision that finalizes the proposed section 163(j) regulations (see 83 FR 67490) and taxpayers will be permitted to apply the rule to prior periods. The Treasury Department and the IRS continue to actively study the remainder of the rules in the September 2019 proposed regulations.

III. Transition Relief Provisions

Under the transition relief provisions proposed in this notice of proposed rulemaking, the final regulations would not apply to certain ownership changes that occur after the delayed applicability date. As discussed in part I of this Explanation of Provisions, the delayed applicability date will be 30 days after the date these regulations are published in the **Federal Register**. In order for an ownership change after the delayed applicability date to qualify for transition relief, the ownership change must occur immediately after an owner shift or equity structure shift that occurs:

- (1) Pursuant to a binding agreement in effect on or before the delayed applicability date and at all times thereafter;
- (2) Pursuant to a specific transaction described in a public announcement made on or before the delayed applicability date;
- (3) Pursuant to a specific transaction described in a filing with the Securities and Exchange Commission submitted on or before the delayed applicability date;
- (4) By order of a court (or pursuant to a plan confirmed, or a sale approved, by order of a court) in a title 11 or similar case (as defined in section 382(l)(5)(F)), provided that the taxpayer was a debtor in a case before such court on or before the delayed applicability date; or
- (5) Pursuant to a transaction described in a private letter ruling request submitted to the IRS on or before the delayed applicability date.

The relevant owner shift or equity structure shift must be a specific, identifiable transaction. For example, a stock buyback pursuant to an announced, on-going program would not qualify.

Taxpayers may continue to rely on Notice 2003-65 with respect to any ownership change qualifying for transition relief, even though the Notice will be obsoleted on the delayed applicability date. However, a taxpayer may choose to apply the final regulations to such an ownership change.

Special Analyses

These proposed regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018)

between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (RFA), 5 U.S.C. chapter 6, the Treasury Department and the IRS hereby certify that these proposed regulations will not have a significant economic impact on a substantial number of small entities. This proposed rule is limited to revising the proposed applicability date of proposed regulations under section 382(h) of the Internal Revenue Code that were published in the **Federal Register** (84 FR 47455) on September 10, 2019. Based on the narrow scope of corporate transactions covered by the proposed regulations' delayed applicability rules, the Treasury Department and the IRS have determined that these proposed regulations are unlikely to affect a substantial number of small entities and are unlikely to have a significant economic impact on any small entities affected.

The Treasury Department and the IRS invite comments on any impact that these regulations would have on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

The Treasury Department and the IRS appreciate the comments that taxpayers and practitioners already have provided regarding the September 2019 proposed regulations and encourage taxpayers and practitioners to provide comments on the proposed regulations contained in this notice of proposed rulemaking. In particular, the Treasury Department and the IRS request comments on whether taxpayers should be

permitted to apply the final regulations to ownership changes occurring before the applicability date and what restrictions, if any, should be placed on such retroactive application.

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the Treasury Department and the IRS as prescribed in this preamble under the “**ADDRESSES**” heading. All comments will be available at <http://www.regulations.gov> or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Statement of Availability of IRS Documents

Notice 2003-65 is published in the Internal Revenue Bulletin (or Cumulative Bulletin) and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

Drafting Information

The principal authors of this notice of proposed rulemaking are Jonathan R. Neuville of the Office of Associate Chief Counsel (Corporate) and Kevin M. Jacobs, formerly of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Partial Withdrawal of Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 382(h)(3)(B)(ii), 382(m), and 7805, §§1.382-2(b)(4) and 1.382-7(g) of the notice of proposed rulemaking (REG-125710-18) published in the **Federal Register** on September 10, 2019 (84 FR 47455) are withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by revising the entry for §1.382-7 to read as follows:

Authority: 26 U.S.C. 7805 * * *

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Section 1.382-7 also issued under 26 U.S.C. 382(h)(3)(B)(ii) and (m).

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Par. 2. Section 1.382-1, as proposed to be revised by 84 FR 47455, September 10, 2019, is further amended by revising the entry for §1.382-7(g) to read as follows:

§1.382-1 Table of Contents.

* * * * *

§1.382-7 Built-in gains and losses.

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(g) Applicability dates.

(1) In general.

(2) Transition relief.

(3) Paragraph (d)(2)(vi) of this section.

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Par. 3. Section 1.382-2, as proposed to be amended by 84 FR 47455, September 10, 2019, is further amended by revising paragraph (b)(4) to read as follows:

§1.382-2 General rules for ownership change.

* * * * *

(b) * * *

(4) Rules provided in paragraphs (a)(9) through (13) of this section. The rules of paragraphs (a)(9) through (13) of this section apply to any ownership change that occurs after the date that is 30 days after the date of publication in the **Federal Register** of a Treasury decision adopting these proposed regulations as final regulations, if §1.382-7(g)(2) does not apply to that ownership change. Notwithstanding the preceding sentence, a taxpayer may apply the rules of paragraphs (a)(9) through (13) of this section to an ownership change to which §1.382-7(g)(2) applies if the taxpayer applies the rules of §1.382-7 to such ownership change.

Par. 4. Section 1.382-7, as proposed to be revised by 84 FR 47455, September 10, 2019, is further amended by revising paragraph (g) to read as follows:

§1.382-7 Built-in gains and losses.

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(g) Applicability dates--(1) In general. Except as otherwise provided in this paragraph (g), this section applies to any ownership change that occurs after the date that is 30 days after the date of publication in the **Federal Register** of a Treasury decision adopting the rules of this section as final regulations (applicability date), if paragraph (g)(2) of this section does not apply to that ownership change. For

ownership changes occurring on or before the applicability date and ownership changes to which paragraph (g)(2) of this section applies, see §1.382-7 as contained in 26 CFR part 1, revised April 1, 2019, and other applicable guidance, including Notice 2003-65 (2003-2 CB 747) (see §601.601(d)(2)(ii)(b) of this chapter). Notwithstanding the preceding sentences of this paragraph (g)(1), a taxpayer may apply this section to an ownership change to which paragraph (g)(2) of this section applies.

(2) Certain ownership changes eligible for transition relief. This paragraph (g)(2) applies to an ownership change after the applicability date that occurs immediately after an owner shift or equity structure shift, if the owner shift or equity structure shift occurs--

(i) Pursuant to a binding agreement in effect on or before the applicability date and at all times thereafter;

(ii) Pursuant to a specific transaction described in a public announcement made on or before the applicability date;

(iii) Pursuant to a specific transaction described in a filing with the Securities and Exchange Commission submitted on or before the applicability date;

(iv) By order of a court (or pursuant to a plan confirmed, or a sale approved, by order of a court) in a title 11 or similar case (as defined in section 382(l)(5)(F)), provided that the taxpayer was a debtor in a case before such court on or before the applicability date; or

(v) Pursuant to a transaction described in a ruling request submitted to the IRS on or before the applicability date.

(3) Paragraph (d)(2)(vi) of this section. Paragraph (d)(2)(vi) of this section applies to loss corporations that have undergone an ownership change on or after June 11, 2010. For loss corporations that have undergone an ownership change before June 11, 2010, see § 1.382-7T as contained in 26 CFR part 1, revised April 1, 2009.

Sunita Lough

Deputy Commissioner for Services and Enforcement.

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